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ATTORNEYS FOR DEFENDANT
DUKE ENERGY RENEWABLES, INC.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal No. 13-CR-268-R
)	
DUKE ENERGY RENEWABLES, INC.)	
)	
Defendant.)	
)	

DEFENDANT’S THIRD ANNUAL PROBATIONARY REPORT

INTRODUCTION

Pursuant to the plea agreement (Doc. 2 § 15(b)(i)) (“Agreement”) and the judgment (Doc. 8 at 2 & attach. B thereto), defendant Duke Energy Renewables, Inc. (“DER”) submits this report to the Court, the U.S. Fish & Wildlife Service (“USFWS”), and the U.S. Department of Justice by and through the U.S. Attorney, District of Wyoming and the Environment and Natural

Resources Division (collectively, “Department”) concerning the DER’s progress in implementing the Migratory Bird Compliance Plan (“MBCP”). Pursuant to the plea and judgment, DER agreed to implement the MBCP with the assistance of the USFWS and Department. The MBCP is attached as Attachment B to both the plea and judgment.

SUMMARY

Since sentencing on November 22, 2013, DER has made substantial progress in implementing the MBCP. At the conclusion of this third year of probation, DER has now met all applicable deadlines and performed all required tasks due to be completed within 36 months of sentencing. The third annual meeting required under the MBCP was held on September 15, 2016, in Cheyenne, Wyoming. During this meeting, the Department and USFWS concurred with this assertion. Additional deadlines and tasks required to be completed beyond 36 months of sentencing will be addressed as applicable in future annual reports.

JUDGMENT REQUIREMENTS

The judgment imposed a sentence of unsupervised probation for a term of sixty (60) months. Consistent with its conditions of probation, DER has:

- paid its special assessment, fine, and restitution payments as ordered by the Court;
- performed its community service by making the required payments;
- met with the USFWS and the Department on April 29, 2014, October 21, 2014, May 27, 2015, December 10, 2015, and September 15, 2016, to discuss DER’s progress in implementing the MBCP and to address any issues or amendments necessary to ensure the MBCP’s effectiveness;
- developed and is in the process of implementing the MBCP, as described in more detail below.

MBCP REQUIREMENTS

Under the MBCP, DER was required to undertake certain tasks within 3, 6, 12, 18, and 24 months of sentencing, which occurred on November 22, 2013. Following is an assessment of DER's progress in implementing the MBCP.¹

1. Bird and Bat Conservation Strategy ("BBCS"). As described in the First Annual Probationary Report, DER completed an initial revision of the BBCSs for each of the four wind sites covered under the Agreement in accordance with the 2012 USFWS Land-Based Wind Energy Guidelines. The BBCSs for the Campbell Hill ("CHW") and Top of the World ("TOTW") wind energy projects are included as an Appendix to the Eagle Conservation Plans ("ECP") for these projects. DER, per the recommendations of the Department of Interior Office of Acquisition and Property Management Debarment Program, updated the BBCSs for TOTW and CHW in March 2016 and for Happy Jack Wind and Silver Sage Wind in April 2016.

2. Tier 5 Golden Eagle Analysis. As noted in the MBCP, DER has collected a significant amount of Tier 2, 3, 4, and 5 data as identified in this section.

- 2.1 Focus of MBCP shall be on golden eagles at the TOTW wind project and CHW wind project: No action required.
- 2.2 Analysis of Tier 2-5 data to be completed within 12 months of sentencing: Completed, as described in the First Annual Probationary Report.
- 2.3 Additional data collected in the first 24 months of the probation term will be used to update this analysis and be included in the ECP development: Completed. As described in Section 6 below, DER submitted draft ECPs for TOTW and CHW to USFWS on November 19, 2015. The draft ECPs include the additional data collected over the last 24 months. Also, since last report, DER performed an orographic lift modeling exercise of TOTW and CHW. This model provides additional information about wind patterns and potential "uplift zones" that area eagles may exploit during hunting and flying. This information, coupled with eagle use, fatality, and observational data, may help identify specific turbines or zones where eagle risk may be higher or lower.

¹ For ease of review, section citations below correspond to sections of the MBCP.

3. Experimental Advanced Conservation Practices.
 - 3.1 Measures to be implemented at the four sites (TOTW, CHW, Happy Jack Wind site, and Silver Sage Wind site):
 - 3.1.1 Carrion removal: Implemented upon the date of sentencing and is an ongoing practice.
 - 3.1.2 Removal of man-made habitat features that may harbor prey species: Completed, as reported in the First Annual Probationary Report.
 - 3.2 Best Management Practices and other single-event actions to be implemented at TOTW.
 - 3.2.1 Removal of roadkill carcasses along SR 95: Implemented within 90 days of sentencing and ongoing at a weekly frequency.
 - 3.2.2 Removal of two guyed meteorological towers: Completed, as reported in the First Annual Probationary Report.
 - 3.2.3 Adjusted Wind Turbine Operation March 15 – October 15: Completed. The Siemens turbine control software was modified on March 5, 2015, and the turbines have been operated in the manner required by this section from March 5, 2015, to present.
 - 3.3 Ongoing Experimental Advanced Conservation Practices to be implemented at TOTW.
 - 3.3.1 Visual deterrent testing: Completed, as reported in the First Annual Probationary Report.
 - 3.3.2 Audible deterrent testing: Completed, as reported in the First Annual Probationary Report.
 - 3.3.3 “Informed Curtailment” at TOTW: Informed eagle curtailments at the TOTW site were initiated ahead of schedule by DER on March 5, 2014, and have been ongoing at TOTW since. USFWS and DER worked cooperatively to develop an interim protocol for informed eagle curtailment. Further improvements and refinements (including the construction of an eagle observation tower) have been completed with additional improvements ongoing with experience. Up to six Eagle Observation Specialists have been contracted and are on the TOTW site daily implementing the Informed Eagle Curtailment program. Continual refinements to the Informed Eagle Curtailment program have been made, including the piloting of the IdentiFlight camera systems (see item 3.5 below).

3.3.4 Test detection technologies at TOTW.

3.3.4.1 Radar proof-of-concept test: Completed, as reported in the First Annual Probationary Report.

3.3.4.2 Radar study evaluation: No material advancements of radar technology have been identified by DER, and USFWS has concurred with this assessment.

3.3.4.3 Consideration of combining detection/deterrent technologies: Ongoing, per requirement. DER continues to collaborate with the American Wind Wildlife Institute on a Technology Verification Program and worked with them on a Department of Energy Funding Opportunity Announcement grant application further evaluating detection/deterrent technologies at operating wind sites, including TOTW. DER continues to work cooperatively with USFWS on the trapping and fitting of golden eagles with GPS tracking devices on the TOTW site with two additional eagles trapped and fitted. These GPS-fitted eagles are providing useful information on eagle migration patterns, timing, and use of the TOTW site.

3.4 Implementation of Experimental Advanced Conservation Practices (ACPs): Informed eagle curtailments are ongoing at the TOTW site. The evaluation of other experimental ACPs is ongoing to determine if they are scientifically proven to reduce golden eagle fatalities at TOTW.

3.5 Development and evaluation of other Experimental Advanced Conservation Practices: DER continues to collaborate with a camera detection technology developer. A camera detection system known as IdentiFlight is currently installed at TOTW with four beta units located on site. These four IdentiFlight units have undergone additional engineering and software upgrades and improvements. The American Wind Wildlife Institute coordinated an independent proof-of-performance test of the system in the summer and fall of 2016. Field data collection is complete, and data analysis is ongoing with a report of findings expected by the end of 2016. Preliminary results have all been promising for the development and use of the IdentiFlight technology to reduce eagle fatalities.

4. Monitoring. DER worked cooperatively with the USFWS on the development of a fatality monitoring protocol, which was finalized by DER on August 15, 2014. The monitoring began on September 15, 2014, and is ongoing.

4.1 Research.

4.1.1 – 4.1.4 Searcher-efficiency and carcass-persistence trials and bias-correction development: The research protocol was approved by USFWS and has been ongoing since March 2015. This research protocol includes searcher-efficiency and carcass-persistent trials. Three trials have been completed to date using up to 20 raptor carcasses per trial provided by USFWS for the carcass-persistent trials and 40 decoys/raptor carcasses for each searcher-efficiency trials. This research element was completed in June 2016, and a summary of results has been provided to USFWS.

4.2 Golden eagle fatalities.

4.2.1 Notification within 24 hours of golden eagle fatalities at TOTW, CHW, Happy Jack and Silver Sage wind projects: Ongoing, per requirement. DER has reported sixteen golden eagle carcasses (six in 2014, eight in 2015, and two, to date, in 2016) to USFWS, all within 24 hours of DER knowledge of discovery since the date of sentencing.

4.2.2 Special Purpose – Utility (SPUT) permit: DER applied for and received SPUT permits for the four Wyoming wind sites. Permits were received on September 17, 2014, and are valid until March 31, 2017.

4.3 Use of Ornicept/Geotraverse monitoring software: Ornicept went out of business, and the Ornicept/Geotraverse software is no longer available. DER has been recording and managing eagle fatality data internally. This was communicated to the Department and USFWS at the September 15, 2016 meeting.

4.4 Continued Monitoring of golden eagle and other migratory bird fatalities: Ongoing, per requirement.

5. Compensatory Mitigation.

5.1 Development of Compensatory Mitigation methods during probation period: At the meetings that were held in Cheyenne, Wyoming between DER, USFWS, and the Department on October 21, 2014, May 27, 2015, December 10, 2015, and September 15, 2016, compensatory mitigation options were discussed. Discussions with USFWS staff have been ongoing. Four compensatory mitigation options are outlined and discussed in the ECPs.

5.2 Compensatory mitigation following issuance of an Eagle Take Permit: No action required at this time, as Eagle Take Permits have not yet been issued.

5.3 Exclusion of compensatory mitigation costs from MBCP cost cap: No action required.

- 5.4 Compensatory mitigation methods: No action required at this time. Ongoing discussions with USFWS staff on compensatory mitigation options have occurred over the past year.
- 5.5 Analysis of other compensatory mitigation techniques: Ongoing, per requirement. To date, in addition to power-pole retrofits, DER has started the evaluation of habitat-based protection/enhancement, lead abatement, and roadkill removal as potential compensatory mitigation for golden eagles. These four options are discussed in the ECPs.

6. Eagle Conservation Plan/Eagle Take Permits. DER submitted Eagle Take Permit applications, associated draft ECPs, and other supporting information, which follow the 2013 Eagle Conservation Plan Guidance, for the CHW and TOTW sites on November 19, 2015. A new Eagle Permit Rule may be released by the end of 2016. Based on the language in the Proposed Rule released in May 2016, this new rule, should it become final, will likely impact parts of the draft ECPs submitted in November 2015. Therefore, it was agreed to by the Department and USFWS at the September 15, 2016 meeting to continue to work toward finalizing the two draft ECPs but to wait to address certain aspects of the ECPs until either a new final rule is published or it is clear that a new final rule will not be published during the remainder of the current Administration.

- 7. MBCP Term: No action required.

DATED: November 15, 2016.

Respectfully submitted,

/s/ Joanna R. Vilos

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I electronically filed the foregoing with the Clerk of the Court using CM/ECF, which will send notification of such filing to all counsel of record:

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